

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS JOHN BEER,

Defendant-Appellant.

UNPUBLISHED

October 18, 2007

No. 272941

Emmet Circuit Court

LC No. 05-002530-FC

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of criminal sexual conduct in the first degree (CSC I), MCL 750.520b, and two counts of criminal sexual conduct in the second degree (CSC II), MCL 750.520c. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions stem from his sexual contact with his wife's then 15-year-old cousin on two separate occasions. After the first assault, defendant allegedly told complainant to not tell others about the incident because he was on parole at the time. Over defendant's objection, complainant was permitted to relate this statement to the jury. On appeal, defendant first argues that the trial court erred when it allowed the prosecutor to present testimony that defendant was on parole at the time of the instant offenses. He maintains that the prejudicial nature of this revelation substantially outweighed any probative value. We disagree.

We review the trial court's decision to admit evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). The abuse of discretion standard "acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). When a trial court chooses one of these principled outcomes, it does not abuse its discretion. *Id.*; *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

MRE 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." Here, the trial court found that the evidence was relevant, especially in light of defendant's admonishment to complainant to not tell anyone about his assault, to explain complainant's delay in reporting the incident. Defense

counsel maintained during his motion to exclude the evidence that this was not an issue at trial. However, this assertion is not supported by counsel's later questioning of the prosecution's witnesses. During cross-examination of complainant, defense counsel asked her why she did not tell her mother about defendant's assault when she learned that defendant was planning to accompany her family on a camping trip up north, or during the trip she took to town in the truck alone with him. Counsel further questioned complainant about why she did not speak to others about the second assault that occurred during this trip, either while the two were in town or when they returned to the family campsite. Counsel also asked complainant whether defendant had told her that he planned to inform her mother about complainant's sexual involvement with another older man. Defense counsel asked similar questions of complainant's mother. Complainant's credibility and possible motive to lie was a central part of defendant's defense. Therefore, contrary to defendant's objection, the evidence of defendant's parole status and complainant's awareness of it was relevant as an explanation of why she did not reveal the abuse sooner. Nor do we find this evidence so substantially prejudicial in light of this probative value that the trial court abused its discretion in permitting its admission. "[A]ll evidence is somewhat prejudicial to a defendant—it must be so to be relevant." *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). We find that the trial court did not abuse its discretion in allowing the prosecution to present this testimony.

Defendant also argues that he was improperly assessed 15 points for sentencing Offense Variable (OV) 8, asporting the victim, based on complainant's allegation that he drove her to the woods after she told him that she wanted to pick mushrooms. We review a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score. See *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). However, to the extent this issue also entails a question of statutory interpretation, it is reviewed de novo. *People v Schaub*, 254 Mich App 110, 114-115; 656 NW2d 824 (2002).

Defendant's assertion that OV 8 was misscored is without merit. In *People v Spanke*, 254 Mich App 642, 646-648; 658 NW2d 504 (2003), another panel of this Court considered the undefined term "asportation" in OV 8, see MCL 777.38, and found that it does not require the forcible movement of the victim, but merely requires the victim be moved to a location of greater danger. In that case, OV 8 was properly scored at 15 points because:

The victims were moved, even if voluntarily, to defendant's home where the criminal acts occurred. The victims were without doubt asported to another place or situation of greater danger, because the crimes could not have occurred as they did without the movement of defendant and the victims to a location where they were secreted from observation by others. [*Spanke, supra* at 648.]

See also *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004) (scoring for OV 8 proper where, although the jury found that there was no use of force, the victim was transported from her friend's house in Dearborn to an unfamiliar house in Hamtramck). Defendant essentially argues that this Court's analysis in *Spanke, supra*, and *Apgar, supra*, is incorrect. However, these cases adhere to the language of MCL 77.38, which does not require that the movement was involuntary. Moreover, we are bound by *Spanke, supra*, and *Apgar, supra*. The sentencing court did not abuse its discretion in scoring OV 8 at 15 points.

Affirmed.

/s/ Donald S. Owens

/s/ Richard A. Bandstra

/s/ Donald S. Owens